No. 83-1494

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RONALD KENT MONTESANO,

Petitioner,

—vs.—

DONREY MEDIA GROUP d/b/a LAS VEGAS REVIEW JOURNAL and SUE VOLEK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

RESPONDENTS' BRIEF IN OPPOSITION

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel of Record for Respondents

Of Counsel:

DEAN RINGEL
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
New York, New York

GEORGE O. KLEIER
Vice President and General Counsel
DONREY MEDIA GROUP

April 7, 1984

Questions Presented

1. May this Court review a decision of the Supreme Court of Nevada when the Nevada Court itself identified an adequate and independent state ground for decision and where the asserted federal constitutional right of privacy relied upon in this Court was not raised at the trial level or at any time prior to supplemental briefing in the Nevada Supreme Court and was not discussed by that Court in its opinion?

2. Did the Nevada Supreme Court err in holding that no claim for privacy could be asserted with respect to a newspaper's publication of an accurate statement of an individual's prior criminal convictions where such facts were available in "official court records" recognized by the Court to be "public records" under Nevada law?

Parties Below

The parties participating below were Ronald Kent Montesano, appellant, and Donrey Media Group d/b/a Las Vegas Review Journal and Sue Volek, respondents.*

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* As required by Supreme Court Rule 28.1, the Donrey Media Group advises the Court that its parent corporation is Donrey, Inc., a Nevada corporation. Donrey, Inc. has no subsidiaries or affiliates other than wholly-owned subsidiaries, except the following:

Overthrust Cablevision, Inc., a Wyoming corporation; Progress Publishing Company, a Texas corporation; and Sun Printing Company, an Arizona corporation.

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OPINIONS BELOW

The opinion of the Supreme Court of Nevada affirming the grant of judgment to the defendants is reported at 99 Nev. (Advance Opinion No. 134), 668 P.2d 1081 (1983) and is annexed as Appendix B to the Petition ("Pet. at ____"); the denial of rehearing by the Nevada Supreme Court is annexed as Appendix C to the Petition. The opinion of the Eighth Judicial District Court, State of Nevada dismissing Petitioner's Complaint is unreported and is annexed to the Petition as Appendix A. ("Pet. App. A-____")

JURISDICTION

The Petition asserts that the jurisdiction of this Court is premised on 28 U.S.C. § 1254 (1982). (Pet. at 2) That section pertains to review of decisions of the federal courts of appeal and does not provide a basis for jurisdiction here. No adequate basis exists for the assertion of jurisdiction under any other section.

The decision below, as more fully discussed in Reasons for Not Granting the Writ, is premised on the adequate and independent state ground that no claim for privacy exists on the facts of this case under Nevada's law of privacy. One basic flaw in the privacy claim, the fact that the publication at issue concerns a matter of "public facts" not "private facts," is specifically denominated a "[g]round" of decision and is clearly based on state law principles. (668 P.2d at 1084) It is thus not subject to review by this Court. Although petitioner now also asserts a claim predicated on a federal "constitutional" right of privacy, no such claim was asserted in the complaint in this action, nor was such claim presented in the "Statement of Issues" filed by petitioner with the Nevada Supreme Court. That Court's opinion did not deal with any such claimed right. Thus the claimed federal "constitutional right of privacy" was not passed upon by the Nevada Supreme Court and under settled practice of this Court would not be considered upon any review. No issue of federal or constitutional law exists upon which jurisdiction may be premised.

STATEMENT OF THE CASE

This case arises from the February 24, 1978 publication in the Las Vegas *Review Journal* of an article written by respondent Sue Volek. The article described the recent murder of a Las Vegas police officer and then recounted the history of other Las Vegas law enforcement officers who had lost their lives in the line of duty. Among the incidents described was one

in 1955 in which a police officer, Robert Dula, was killed by a hit and run driver fleeing a crime scene. Plaintiff Montesano was identified in the article as an occupant of the car and his arrest and subsequent sentencing to the State Industrial School were recounted. Reference to "police records" was made in describing the sources of the information about Montesano who, at the time of the incident, was 17. The article described the subsequent history of the individuals involved in the deaths of the police officers and, in this connection, noted Montesano's subsequent arrest in connection with a police "narcotics raid." As the article reported, Montesano pled guilty to possession of marijuana and was sentenced to two years in the Nevada State Prison.

A complaint was filed on behalf of plaintiff on April 19, 1979 in the Eighth Judicial District Court of the State of Nevada. It alleged two purported causes of action. The first asserted that the newspaper story described above was actionable because it reported "private facts concerning the Plaintiff consisting of juvenile offenses allegedly committed more than twenty years previously. . . ." (¶ V)[1] The complaint itself acknowledged that plaintiff "was involved in juvenile offenses" (¶ VI) but it contended that plaintiff "thereafter has lived in a law abiding and respectable manner. . . ." (*Id.*) The complaint alleged that plaintiff had been injured by the publication and sought both compensatory and punitive damages.

The complaint also alleged that the publication in question violated Nev. Rev. Stat. § 62.200(3) (now Nev. Rev. Stat. § 62.211(3) (1983)) (Second Claim, ¶ II) which prohibits the publication of the name of a juvenile without written permission of the court.

No reference was made in the complaint to any purported federal constitutional right of privacy.

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1 In fact, as the Nevada Supreme Court ultimately held, plaintiff was sentenced as an adult with respect to the 1957 offense. (668 P.2d at 1085)

Respondents moved to dismiss the complaint on the ground that it failed to state a claim. They annexed to their moving papers various public records, including probation reports, reflecting the 1955 and 1957 arrests, adjudications and sentencing. The motion to dismiss was granted, the Nevada District Court concluding that no "publication of 'private facts' occurred" such as could give rise to a cause of action for invasion of rights of privacy. (Pet. App. A-1) No reference was made by the parties or the District Court to any asserted federal constitutional right of privacy.

On appeal, the Nevada Supreme Court affirmed the dismissal. The Nevada Supreme Court expressly held that the court below considered the public record material available to it and that the motion was treated as one for summary judgment.

The Nevada Supreme Court noted that it had previously impliedly accepted the existence of an action for invasion of privacy under Nevada law and stated that the claim petitioner sought to make was one for "public disclosure of private facts." The Court described the elements required in the following terms:

> "To maintain a cause of action for public disclosure of private facts one must prove that a public disclosure of private facts has occurred which would be offensive and objectionable to a reasonable person of ordinary sensibilities." (668 P.2d at 1084)

It noted that two distinct questions were presented: [1] "whether the publicity concerned the private, as distinguished from public life, of the [petitioner] and [2] whether the matter publicized is of a kind that is not of legitimate concern to the public." (*Id.* at 1084-85) It decided each of these matters adversely to the petitioner. Two judges dissented.

The opinion did not discuss any claim that a federal constitutional right of privacy existed.

Rehearing was denied and the present petition for certiorari followed.

REASONS FOR DENYING THE WRIT

I.

The Decision of the Nevada Supreme Court Is Based on Independent State Grounds and No Federal or Constitutional Question Is Presented for Review.

The petition purports to raise as its first question the propriety of denying petitioner "a constitutionally protected federal right" of privacy. (Pet. at i) As demonstrated in Point II, *infra*, no such right exists with respect to a privately owned newspaper. But as a threshold jurisdictional matter, the reality is that no claim concerning such federal right was asserted in the complaint or in any proceedings before the trial court, nor was the matter identified as an issue on appeal or passed upon by the Nevada Supreme Court.[2] Under long-settled principles this Court will not entertain a claim under such circumstances.

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2 While appellant's initial briefs in the Nevada Supreme Court did refer to a constitutional right of privacy, those briefs are explicit that the argument was one based on Article 1, Section 1 of the Nevada Constitution and premised on an asserted analogy to California law. (Appellant's Opening Brief at 8-9) Petitioner stated in his initial briefing to the Nevada Supreme Court that "[t]he question before this honorable Court, therefore, is whether under the conceded facts as enumerated above the Appellant has stated a claim for relief under *the laws of the State of Nevada*." (Appellant's Reply Brief at 4 (emphasis added))

The first reference below to any federal constitutional right appears in a "Supplemental Points and Authorities" ("Supp. Br.") filed by petitioner after the close of briefing in the Nevada Supreme Court at the specific request of that Court to deal with several cases not previously briefed by any party. (Supp. Br. at 2) The *sole* authority cited by respondent for the proposition that a federal constitutional right exists was the Ninth Circuit's decision in *Virgil* v. *Time, Inc.*, 527 F.2d 1122 (9th Cir. 1975), *cert. denied*, 425 U.S. 998 (1976), one of the cases as to which the Nevada Supreme Court sought briefing. But, the quotation relied upon from *Virgil* refers not to any constitutional right of privacy, but to a constitutional privilege *limiting* the privacy tort.

(footnote continued)

> "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

See also NLRB v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-64 (1975) (even though raised in Court of Appeals, issue not considered by this Court because not raised in the District Court).

The decision of the Nevada Supreme Court did, of course, deal with federal constitutional principles—the First Amendment principles which limit the scope of any permissible privacy claim. Most notable among the decisions on this subject relied upon below is this Court's ruling in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). But the constitutional principles set forth in *Cox* and discussed at length in part 3 of the Court's opinion did not provide the sole basis for decision.

The decision of the Nevada Supreme Court finding that petitioner had no claim for invasion of privacy rested on two distinct and independent grounds: 1) that the article in question involved public, not "private facts" and 2) that the article dealt with a matter of "legitimate public concern." Either of these grounds provides a sufficient basis for finding that a claim has not been asserted under Section 652(D) of the Restatement (Second) of *Torts* (1977), upon which the Court relied for its definition of the underlying tort.

(527 F.2d at 1129) The Nevada Supreme Court did not discuss any federal constitutional right of privacy.

The Nevada Supreme Court was free to reject any legal claim not raised below, let alone one not even raised in the initial briefing on appeal. (See its opinion, 668 P.2d at 1085 n.5, and case cited therein.) And as this Court has noted " 'when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.' " *Fuller* v. *Oregon*, 417 U.S. 40, 50 n.11 (1974). Here the circumstances make plain the correctness of that approach.

That section provides:

> "One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public."[3]

That failure to satisfy *either* element of the tort provides a basis for dismissal was recognized by the Iowa Supreme Court in *Howard* v. *Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980), a case heavily relied upon by the Nevada Supreme Court.

The Nevada Supreme Court entitled one portion of its opinion "The Public Record Ground" and expressly held that "for the purposes of the tort of invasion of privacy, materials properly contained in a court's official records are public facts." (668 P.2d at 1084-85) The Court held that the references to both the 1955 and 1957 criminal activities in the 1957 probation report were not subject to any statutory privilege of confidentiality and thus were "public facts." (668 P.2d at 1085-86) In ruling on this "public record ground" the Court relied upon the *Restatement* itself and a host of decisions from other state courts dealing with the elements of the privacy tort, not constitutional principles. Strikingly, several of the decisions relied upon, including *Hubbard* v. *Journal Publishing Co.*, 69 N.M. 473, 368 P.2d 147 (Sup. Ct. 1962) (which also dealt with information concerning juvenile offenders) were decided long before this Court's constitutional decision in *Cox Broadcasting*

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3 The Restatement "Comments," like the text of the Restatement, deal separately with the public/private facts dichotomy and the question of whether a matter is of legitimate public concern. (*Compare* comment (b) *with* comment (d).)

Corp. v. *Cohn*, *supra*, and thus could not have relied upon any constitutional principles set forth therein.[4]

Thus, the portion of the Nevada Supreme Court's decision denominated "the public record ground" constitutes a "plain statement" of an "adequate" and "independent" state ground of decision. *Michigan* v. *Long*, 103 S. Ct. 3469 (1983).

This Court has made clear it will not review a state court judgment based upon such an adequate and independent state ground, since:

> "[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

Accord, *Berea College* v. *Kentucky*, 211 U.S. 45 (1908); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935).

And where a decision, as here, rests on "two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp.* v. *Muller*, *supra*, 296 U.S. at 210. That is precisely the case here.

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4 Indeed, in *Cox* this Court recognized that "even the prevailing law of invasion of privacy generally requires that the interests in privacy fade when the information involved already appears on the public record." (420 U.S. at 494-95) Only after stating this view of the common law did this Court go on to its separate analysis of the constitutional issues. *Cox* was cited for precisely this proposition as to *common law* in part 2 of the Nevada Supreme Court's decision.

II.

The Decision Below Was Plainly Correct

The Petition asserts that a right of privacy exists here which is of "constitutional dimension . . . and [is] protected by federal law." (Pet. at 3) This proposition is plainly incorrect.

The only authority cited for the proposition is the Ninth Circuit's decision in *Virgil* v. *Time, Inc.*, *supra*. The portion of *Virgil* relied upon, however, plainly refers not to the privacy claim itself but to the *privilege* to report newsworthy matters as a matter of "constitutional dimension." (527 F.2d at 1128-29)[5]

Nor does other authority support the existence of the federal constitutional right asserted by Montesano.

This Court has rejected a claim that a federal constitutional right protecting against unwanted publicity existed in *Paul* v. *Davis*, 424 U.S. 693 (1976). In that case a citizen challenged a police official's distribution of his photograph as part of a list of "Active Shoplifters." The Court concluded that this distribution did not involve a deprivation of a constitutional right. The Court noted that while its "right of privacy cases" defied "categorical description" they generally related "to marriage, procreation, contraception, family relationships, and child rearing and education." (424 U.S. at 712-13) There, as here, the privacy interest bore no relationship to such matters.

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5 In his first reference to any such right, in a supplemental brief filed with the Nevada Supreme Court, petitioner quoted the passage in *Virgil* he relied upon:

> " ' . . . we are satisfied that this provision is one of constitutional dimension delimiting the scope of the tort and that the extent of the privilege thus is controlled by federal rather than state law.' " (Supp. Br. at 2)

The reference to the "provision" in this passage was to the "privilege to publicize newsworthy matters." (527 F.2d at 1128) This was omitted from petitioner's argument.

Even more fundamentally, federal constitutional privacy claims run against the government, not private citizens. As this Court stated in *Paul* v. *Davis*, *supra*, where constitutional privacy claims have been found "it has been held that there are limitations on the *States*' power to substantively regulate conduct." (424 U.S. at 713) (emphasis added) This Court has recognized that protection of privacy against non-governmental intrusion, the "right to be let alone by other people—is . . . left largely to the law of the individual States." *Katz* v. *United States*, 389 U.S. 347, 350-51 (1967) (footnotes omitted); *see also Reilly* v. *Leonard*, 459 F. Supp. 291, 299 (D. Conn. 1978); *Arrington* v. *New York Times Co.*, 55 N.Y.2d 433, 434 N.E.2d 1319 (1982), *cert. denied*, 103 S. Ct. 787 (1983) (both rejecting claim of constitutional right of privacy against newspaper).

Thus no federal constitutional right of privacy can be asserted to challenge the holding below. Nor was the Court's reliance on *Cox Broadcasting Corp.* v. *Cohn*, *supra*, in error even if the constitutional principles announced in that case were viewed, contrary to the argument set forth in Point I, as the sole basis for the decision of the Nevada Supreme Court.

In *Cox* this Court was faced with a civil claim brought by the father of a deceased rape victim who asserted that his privacy had been invaded by the publication of his daughter's name in violation of a Georgia statute purporting to prohibit the publication of the name of a rape victim. This Court held that

> "a civil action against a television station for breach of privacy could not be maintained consistently with the First Amendment when the station had broadcast only information which was already in the public domain. 'At the very least, the First and Fourteenth Amendments will not allow exposing the press to liability for truthfully publishing information released to the public in official Court records.'" *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 840 (1978), quoting in part from *Cox*, *supra*, 420 U.S. at 496.

The Nevada Supreme Court has held by way of interpreting Nevada statutory law, that the information published here was drawn from the "public record." (668 P.2d at 1085-86 & n.5) The publication at issue thus fits squarely and explicitly within the controlling holding of *Cox* and may not provide the basis for a claim.

Petitioner asserts that the passage of time between the creation of the public record and publication somehow dilutes the applicability of *Cox*. But the holding in *Cox* is not so qualified and the courts of last resort which have considered this contention since *Cox* was decided have flatly rejected it. *See Howard* v. *Des Moines Register & Tribune Co.*, 283 N.W.2d 289 (Iowa 1979), *cert. denied*, 445 U.S. 904 (1980); *Rawlins* v. *Hutchinson Publishing Co.*, 218 Kan. 295, 543 P.2d 988 (1975).[6] This Court observed in *Cox* that

> "We are reluctant to embark on a course that would make public records generally available to the media but forbid their publication if offensive to the sensibilities of the supposed reasonable man. Such a rule would make it very difficult for the media to inform citizens about the public business and yet stay within the law. The rule would invite timidity and self-censorship and very likely lead to the suppression of many items that would otherwise be published and that should be made available to the public." 420 U.S. at 496.

This reasoning precludes the approach petitioner urges, for that approach would reintroduce the very uncertainty, the subjective assessment, and ultimately, the timidity about the reporting of public record material, that this Court sought to avoid. Assessments of whether "too much" time had passed or a weighing of the passage of time against a subjective assess-

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6 In so doing, these cases rejected the pre-*Cox* decision of the California Supreme Court in *Briscoe* v. *Reader's Digest Ass'n*, 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) relied upon by petitioner.

ment of newsworthiness invites the very evil *Cox* sought to avoid.[7]

The conclusion of *Cox* is plain:

> "Once true information is disclosed in public court documents open to public inspection, the press cannot be sanctioned for publishing it." 420 U.S. at 496.

The decision below, holding that no claim existed for the reporting of accurate information disclosed in public court records, is correct.

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7 Indeed the subjective judicial process involved in weighing the impact of the passage of time against the "newsworthiness" or "public interest" inherent in the reporting of public record material poses one of the problems which led this Court to reject the "public or general interest" standard in the defamation context in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1974). There this Court held it to be unseemly for the judicial system to determine what material is "relevant to self-government." That is precisely the obligation the petitioner would impose on the judicial system here.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FLOYD ABRAMS
80 Pine Street
New York, New York 10005
(212) 825-0100

Counsel of Record
for Respondents

Of Counsel:

DEAN RINGEL
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
New York, New York

GEORGE O. KLEIER
Vice President and
General Counsel
DONREY MEDIA GROUP